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NO. 99-1185

IN THE
SUPREME COURT OF THE UNITED STATES

MARK SELING, Superintendent,
Special Commitment Center,

Petitioner,

v.

ANDRE BRIGHAM YOUNG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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1. Introduction

This case concerns Washington's Sexually Violent Predator Statute (Statute), Wash. Rev. Code 71.09, which provides for the civil commitment and treatment of sexually violent predators. The Washington law is substantially similar to the Kansas law upheld by this Court in *Kansas v. Hendricks*, 521 U.S. 346 (1997). The court of appeals ruled that the Statute did not violate Young's right to substantive due process or equal protection. *Young v. Weston*, 192 F.3d 870, 876 (9th Cir. 1999); Pet. App. at 12a.[1]

The Ninth Circuit also recognized that "*Hendricks* forecloses the claim that the Washington statute, on its face, violates the *ex post facto* and double jeopardy clauses". *Id.* at 874; Pet. App. at 7a. However, the Ninth Circuit concluded that an otherwise valid civil statute can be divested of its civil nature and be held to violate the *ex post facto* and double jeopardy clauses, if the commitment facility fails to provide for treatment and other conditions of confinement required by the Statute. This case presents an important question of law that requires resolution by this Court.

2. The Ninth Circuit's Decision Directly Conflicts With A Decision Of The Washington Supreme Court

The Washington Supreme Court, in *In re the Detention of Turay*, 139 Wash. 2d 379, 986 P.2d 790, 810-12 (1999), expressly rejected the Ninth Circuit's decision in this

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[1] Young's substantive due process and equal protection claims were facial challenges to the Statute. Young did not file a cross petition for certiorari. An argument that would modify the judgment cannot be presented unless a cross petition has been filed. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n.14 (1985). Here, the judgment of the Ninth Circuit granted Young an evidentiary hearing related to his *ex post facto* and double jeopardy claims. *Young*, 192 F.3d at 876; Pet. App. at 13a. An argument that would invalidate the Statute, on its face, without the need of an evidentiary hearing modifies the court's judgment. Accordingly, these issues are not before the Court.

case, concluding that its analysis was flawed. According to the Washington Supreme Court, to determine if a statute is civil or criminal "a court must look at the statute on its face". *In re Turay*, 986 P.2d at 811. The Washington Supreme Court rejected the Ninth Circuit's conclusion that the civil or criminal nature of a statute can be determined by examining the actual conditions of confinement. *Id.* at 812.

Young seeks to minimize this conflict in two ways. First, Young claims that the Washington Supreme Court reviewed conditions of confinement in *In re the Detention of Campbell*, 139 Wash. 2d 341, 986 P.2d 771 (1999). Br. Opp'n at 27-28. This is incorrect. *In re Campbell* also held that the civil or criminal nature of the statute must be determined on the face of the statute. The court in *In re Campbell* stated:

> "We have held, in order to evaluate a statute's constitutionality, *a court's task is to look at the statute on its face, not whether it is adequately applied. Winchester v. Stein*, 135 [Wash.] 2d 835, 959 P.2d 1077 (1998). *Winchester* expressly noted that 'the *focus . . . is on the sanction allowed by the statute, not the actual sanction imposed in a particular case*.' *Winchester*, 135 [Wash.] 2d at 847." *In re Campbell*, 986 P.2d at 775 (emphasis added).

The *In re Campbell* court went on to reiterate the principle that:

> "'A legislature's designation of a penalty as civil is entitled to considerable deference and that designation will not be overborne *unless the statute, considered on its face and without reference to the level of sanction imposed in the particular case*, is clearly so punitive as to render it criminal despite the legislature's intent to the contrary.' *Winchester*, 135 [Wash.] 2d at 853 (emphasis added)." *In re Campbell*, 986 P.2d 775.

The only reference to conditions of confinement was based on the assumption that it was proper to consider conditions of confinement. The court said:

> "*Even assuming* Campbell may properly challenge the validity of his order of commitment based upon the conditions of confinement at the SCC, *but see In re Detention of Turay*, 139 [Wash.] 2d 379, 413-20, 986 P.2d 790 (1999) (conditions of confinement do not implicate legality of commitment order), Campbell has failed to prove the conditions of confinement are punitive, so as to render the statute unconstitutional as applied to him." *Id.* at 775 (emphasis added).

Thus, the Ninth Circuit's decision conflicts with both *In re Turay* and *In re Campbell*. In both decisions the Washington Supreme Court rejects the Ninth Circuit's view that the civil nature of a statute is to be determined by examining the actual conditions of confinement.

Young's second argument is that the conflict between the Washington Supreme Court and the Ninth Circuit involves nothing more than a dispute over whether to hold an evidentiary hearing. Br. Opp'n at 27. This argument mischaracterizes the issue in this case. The conflict centers on an important principle of constitutional analysis. How does a court determine whether a law is civil or criminal for

purposes of the *ex post facto* and double jeopardy clauses? This is a purely legal question that requires resolution by this Court.[2]

3. The Conflict In This Case Is Important And Requires Resolution By This Court

The conflict between the Washington Supreme Court and the Ninth Circuit is clear. It is an important conflict that requires resolution. The conflict is important for two reasons. First, the law in Washington State is uncertain. State courts, bound by the decision of the Washington Supreme Court in *In re Turay* and *Young*, analyze the Statute one way. Federal courts, bound by the decision of the Ninth Circuit, analyze the Statue another way. This uncertainty can only be resolved by a decision of this Court.

Second, the question presented in this case is important because of uncertainty over the meaning of two of this Court's decisions—*Hendricks* and *Hudson v. United States*, 522 U.S. 93 (1997). Young argues at length that the Ninth Circuit's decision is correct. Young claims that the majority in *Hendricks* looked not only at the language of the statute but also the actual conditions of confinement. Br. Opp'n at 7-9. Young also argues that *Hudson's*

[2] Young notes that the State has not argued that conditions at the special commitment center are not punitive. Br. Opp'n at 6. We have not discussed conditions at the center because they are not relevant to the legal issue presented in this case. The Appendix to Young's brief contains two orders from another proceeding, *Turay v. Seling*, U.S.D.C. W.D. Wash., No. C91-664WD, which has been consolidated with other cases. Br. Opp'n App. A, B. These orders are the result of an action under 42 U.S.C. § 1983 over conditions of confinement at the special commitment center. A jury found for the state on all issues except failure to provide adequate mental health treatment, and the district court entered an injunction to improve the mental health treatment. Br. Opp'n App. A-1. The state has appealed the orders issued in 1988 (not included in Young's appendix) and 1999 (included as Appendix B). *Sharp v. Seling*, 9th Cir., No. 99-35015; *Turay v. Weston*, 9th Cir., No. 99-35202; *Sharp v. Seling*, 9th Cir., No. 00-35092.

command that the civil or criminal nature of a law must be determined on the face of the law does not apply when confinement is involved. Br. Opp'n at 10-15.[3]

Far from demonstrating the absence of any conflict, Young's arguments illustrate the dramatically different interpretations to which *Hendricks* and *Hudson* are subject. Only this Court can clarify the meaning of these two important decisions.

4. The Ninth Circuit's Decision Conflicts With *Hendricks* Because In Washington, As In Kansas, A Prior Conviction Is Only Used For An Evidentiary Purpose

In the petition, we argued that the Ninth Circuit's decision conflicts with *Hendricks* because this Court held that the *ex post facto* and double jeopardy clauses were not violated. This is because a prior conviction was only evidence to prove dangerousness and the presence of the requisite mental condition. Pet. at 20-23. Young argues that the Washington law is different from the Kansas law and that a prior conviction is an element to be proven at the commitment hearing. Br. Opp'n at 24-27.

This argument is not well taken. In fact, on this point the Washington law and the Kansas law are identical. The Kansas law in *Hendricks* defined a "sexually violent predator" as "*any person who has been convicted of or*

[3] Young also argues that courts have always considered the application of a statute in such diverse contexts as equal protection, establishment of religion, and the takings clause of the Fifth Amendment. Br. Opp'n at 16-20. However, the question here is whether a law is civil or criminal. Conditions of confinement can be challenged, but not for the purpose of determining the civil nature of a law. As the Washington Supreme Court observed in *In re Campbell*, "the State correctly notes that 'Campbell's argument confuses the issue of a committed individual's due process rights following a valid commitment under the Statute with the analysis of whether the Statute's scheme for involuntary commitment is constitutional.' Br. of Resp't at 21." *In re Campbell*, 986 P.2d at 774.

charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence. § 59-29a02(a)." *Hendricks*, 521 U.S. at 352 (emphasis added).

Washington's law applies the same definition. Wash. Rev. Code § 71.09.020(1) (1990) provides that "sexually violent predator" means "*any person who has been convicted of or charged with a crime of sexual violence* and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence". (Emphasis added); Pet. App. at 104a.[4]

The Washington and Kansas laws operate exactly the same way: Conviction of a prior crime is required because such conviction or charge provides the best proof of both dangerousness and the presence of the requisite mental condition. Young's argument fails because the Washington and Kansas laws have identical requirements.

5. Young's Substantive Due Process Claim Does Not Provide A Basis For Denying The Petition

If there is no violation of the *ex post facto* and double jeopardy clauses, Young suggests that substantive due process provides an alternate basis to support the Ninth Circuit's judgment that he is entitled to an evidentiary hearing on the conditions of confinement at the special commitment center. Br. Opp'n at 28-29.[5] Young's

[4] In 1995, the definition of "sexually violent predator" was amended to add the words "if not confined in a secure facility" to the end of the definition. Wash. Rev. Code § 71.09.020(1) (1998) now provides that "sexually violent predator" means "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility". Pet. App. at 114a.

[5] It is not clear that Young raised this alternative argument in the district court or the court of appeals. When Young argued the *ex post facto* and double jeopardy clauses he also mentioned substantive due process. However, he did not argue that there was a substantive due process violation, based on the conditions of confinement, if there was no violation of the *ex post facto* and double jeopardy clauses. Neither the district court nor the court of appeals ruled on this claim or even mentioned it in their analysis of Young's substantive due process claims. Pet. App. at 12a, 18a-20a.

alternative argument is not an independent state ground to uphold the Ninth Circuit's decision and does not provide a basis for denying the petition.

The Ninth Circuit has ruled that the Statute does not, on its face, violate substantive due process and equal protection. *Young*, 192 F.3d at 876; Pet. App. at 12a. Young does not seek review of these rulings. If there is no violation of the *ex post facto* and double jeopardy clauses, Young has been properly committed under a valid civil statute. His alternative argument is that a person who has been properly committed is entitled to be released based on the conditions of confinement that violate substantive due process. Neither *Zinermon v. Burch*, 494 U.S. 113 (1990), nor *Reno v. Flores*, 507 U.S. 292 (1993), cited by Young, stand for this proposition.

The Court has ruled that a person who has been committed may be entitled to damages or injunctive relief if conditions of confinement violate substantive due process. *See, e.g., Youngberg v. Romeo*, 457 U.S. 307 (1982). However, it is by no means clear that such a claim may be raised in a habeas corpus petition. As this Court observed in *Bell v. Wolfish*, 441 U.S. 520, 527 n.6 (1979): "Thus, we leave to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of the confinement itself. *See Preiser v. Rodriguez*, 411 U.S. 475, 499-500 (1973)."

6. Conclusion

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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